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THE ADMISSIBILITY IN EVIDENCE OF CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE IN THE POSSESSION OF THIRD PERSONS.—The privilege accorded communications between husband and wife originated in the public policy which seeks to preserve inviolate the peace, good order, and limitless confidence which should characterize marital relations in well-ordered society.[1] This privilege, in time of origin, was among the first of such privileges to be recognized at common law. The first instance of its application is found to be about the year 1685;[2] yet the explicit statement of the privilege as such did not appear until the English Common Law Procedure Act, about the year 1852.[3] The explanation for this seeming paradox is that until that time the present privilege of communications between husband and wife had been confused with the rule of the common law disqualifying the husband or wife from testifying for or against each other. In other words, the true policy of the present privilege was perceived, but not enforced as a rule, within itself separate and distinct. This was largely due to the fact that few cases of privileged communications arose at

[1] Mercer *v.* State, 40 Fla. 216, 24 South, 154.

[2] Lady Ivy's Trial, 10 How. St. Tr. 555, 628. (A husband's oath to the wife's request to him to commit forgery not admitted against her as witness.)

[3] As late as 1852 Mr. J. Erle in Stapleton *v.* Craft's, 18 Q. B. 367, 374 believed that "As no protection was given to conjugal confidence in respect to the wives of the witnesses not parties" the rule must be regarded as "Not yet established."

that time which did not fall within the category of marital disqualifications. Upon the abolition by modern statutes of these disqualifications, it became necessary to establish as an independent rule the privilege of communications between husband and wife.

The reason for excluding as evidence communications between husband and wife seems to be based upon sound public policy. The communication arises out of confidence, and confidence is essential to the marital relation; the relation is a proper object for the encouragement of the law; and the mischief and injury that would ensue from compelling disclosures of confidential communications between husband and wife would be greater than the benefits to be derived from their aid in judicial investigations.[4] And though it may tend to suppress the truth in isolated cases, at the same time it affords to society, as a whole, a benefit which the law should not disturb. Failure to protect it would tend to destroy the bond of mutual confidence and unquestioned trust which is essential to domestic peace. The law, therefore, should protect with zealous care any violation of confidence arising out of the marriage status.[5] Where, on the other hand, no confidence or secrecy was intended, the reason for the protection is lacking, and the privilege does not apply.[6] For this reason oral communications between husband and wife knowingly made in the presence of third parties are not privileged, because no secrecy between husband and wife could be intended,[7] and the public policy underlying this privilege seeks only to preserve inviolate the secret communications between husband and wife.

The question then naturally arises, should the privilege protect oral communications between the husband and wife, intended in confidence and secrecy, which, unknown to the parties, are overheard by eavesdroppers? The answer to this question should be ascertained from the reasons for the privilege and the objects sought in allowing it. As seen above, the true reason for the existence of the privilege is not because the communication fails to fall into the control of the third party, but because public policy forbids that marital confidences be subjected to publicity. If public policy makes the communication privileged where not heard by a third party, can the intervention of eavesdroppers lessen or eliminate the demands of public policy to preserve inviolate the marital secret? It would seem that the demands of public policy which make the communication privileged in those cases where not heard by eavesdroppers would operate with equal force in those cases where the communication, unknown to the husband and wife, is overheard by eavesdroppers. While this view seems clearly sound on principle, the courts have failed to recognize it, and the great majority of decided cases hold *contra*.[8]

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[4] See 4 WIGMORE, Ev., § 2285.
[5] Mercer *v.* State, *supra*; Lingo *v.* State, 29 Ga. 470.
[6] See Hester *v.* Hester, 4 Dev. 228, 230.
[7] Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31.
[8] Commonwealth *v.* Griffin, 110 Mass. 181; Commonwealth *v.* Everson, 123 Ky. 330, 96 S. W. 460, 124 Am. St. Rep. 365.

Where the subject-matter of the communication is in writing and in the possession of either spouse, the authorities agree that the privilege prevents its admission as evidence, except by consent.[9] A conflict arises where such written communications have fallen into the hands of third parties. Probably the weight of authority holds that the privilege is lost under such circumstances,[10] and this even though the written communication was obtained by a third party through fraud or force.[11] It would seem, however, that such a holding contravenes the spirit of the policy which gave rise to the privilege, and that such written communications should be inadmissible (save by consent), notwithstanding the fact that they may have fallen into the hands of third persons.[12] Consonant with this principle, it was held, in the recent case of *McCormick* v. *State* (Tenn.), 186 S. W. 95, that written communications between the defendant and his wife which had fallen into the hands of third persons were inadmissible as evidence against the husband.

It is believed that the privilege should attach to the communication itself. The policy of law that forms the foundation of the rule is best subserved by those authorities which declare that the privilege results from the inherent character of the communication itself.[13] As said above, the communication is privileged, where privileged at all, not because it fails to fall into the hands of a third party, but because it arises out of absolute confidence between husband and wife, and because public policy demands that marital confidences shall not be subject to publicity. Therefore, the very *raison d'être* of the privilege indicates that the immunity attaches to the communication itself; and any recognition of the privilege whatsoever, if based on the true ground, would seem to admit this fact. Hence, to recognize the privilege in those instances where the subject-matter of the communication remains in the custody of the spouse addressed, but to refuse to recognize it in those cases where the communication comes into the possession of a third party, would seem to utterly lose sight of the demands of public policy, and to make a distinction which is incapable of justification on principle. If the demands of public policy are sufficiently strong to cause the communication when first written or uttered to be privileged, then the communication should be none the less privileged after it falls into the hands of third parties; since the same reasons continue to exist, and the demands of public policy affect the communication with a perpetual contemporaneousness.[14]

There seems to be a tendency among some authorities, which rec-

[9] Mitchell *v.* Mitchell, 80 Tex. 101, 15 S. W. 705; Lanctot *v.* State, 98 Wis. 136, 73 N. W. 575.

[10] State *v.* Buffington, 20 Kan. 599, 27 Am. Rep. 193; People *v.* Dunigan, 163 Mich. 349, 128 N. W. 180, 31 L. R. A. (N. S.) 940; People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; State *v.* Mathers, 64 Vt. 101, 23 Atl. 590, 15 L. R. A. 268, 33 Am. St. Rep. 921.

[11] People *v.* Dunigan, *supra*; State *v.* Mathers, *supra*.

[12] Mercer *v.* State, *supra*; Bowman *v.* Patrick, 32 Fed. 368; Scott *v.* Commonwealth, 94 Ky. 511, 23 S. W. 219, 42 Am. St. Rep. 371.

[13] Mercer *v.* State, *supra*.

[14] Mercer *v.* State, *supra*.

ognize the true rule as to communications in the hands of third parties, to hold that the privilege is lost where the communicating spouse voluntarily entrusts a written communication into the hands of a third person for delivery to the other spouse.[15] It would seem, upon principle, that this act should constitute nothing more than evidence to rebut the presumption of the document's containing a privileged communication. As has been indicated, where no confidence was intended on the part of the addressing spouse, the privilege has no application to the case.[16] It seems proper to hold all marital communications prima facie confidential, and that a contrary intention should be made to appear from the circumstances in order to rebut the presumption.[17] Looking at the habits of married persons, and the infrequency of expressed injunctions of secrecy, the implication of secrecy and confidence seems more consonant with the habits of married life. If, therefore, the circumstances show that secrecy was intended, in spite of the voluntary delivery to the third party, the communication should be privileged and protected. On the other hand, if the circumstances of the delivery to the third party show that no secrecy was intended, then the privilege has no application.[18] Supposing that the husband should write a letter to his wife intending secrecy and confidence, but before the letter is posted the husband is arrested and the letter taken from his person. Should the letter to the wife, which contains evidence of the crime alleged to have been committed by the husband, be privileged? The answer to this question lies in the principle contended for, that the privilege should protect the subject-matter of the communication even though in the hands of third parties.[19]

In England a doctrine seems to prevail among some courts that, while the original document or written instrument is privileged, secondary evidence of its contents may be admitted.[20] It is difficult to understand the basis of such a distinction. This is, in effect, enforcing the privilege only as to the physical instrument on which the communication is written, and not as to the subject-matter of the communication, which is entirely aside from the purpose for which the privilege is designed.

It is held by some authorities that since the privilege is intended to secure freedom from apprehension of disclosure in the minds of the one desiring to communicate,[21] it follows that the privilege belongs to the communicating spouse only, and the other spouse—the addressee of the communication—is not entitled to claim the privilege.[22] This is not the case, however, where the spouse addressed

[15] People *v.* Hayes, *supra.*
[16] See Hester *v.* Hester, *supra.*
[17] See Robins *v.* King, 2 Leigh. (Va.) 140; 4 WIGMORE Ev., § 2336.
[18] See Hester *v.* Hester, *supra.*
[19] Mercer *v.* State, *supra.*
[20] Calcraft *v.* Gest, L. R., 1 Q. B. 759; Lloyd *v.* Mostyn, 10 Mees. & W. 478.
[21] See 4 WIGMORE, Ev., § 2340.
[22] See Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

has accepted the statement; since that act makes the communication doubly privileged.[23]

It need hardly be said that, since the privilege is a personal one, it may be waived.[24] A few courts, however, seem to have lost sight of this doctrine and hold otherwise. This holding is probably due to the confusion of disqualification with privilege of communication.[25] The latter, of course, may be waived since the term "privilege" itself implies the right of the recipient to decide whether to take advantage of it or not.

The privilege is not terminated by a severance of the marital relation. The objects sought to be obtained in granting the privilege can only be obtained by continuing the protection, in spite of a termination of the marital relation. And in this respect the privilege differs from the common law marital disqualification. The same considerations do not apply, however, to the acts or conduct of the married parties. To extend the privilege to embrace such cases would be going beyond the purpose for which the immunity was designed.[26] Again, the privilege has no application to communications made between husband and wife then living in separation, or to communications between persons living in unlawful cohabitation; because to such cases the policy of the privilege does not apply, since such relations are not those in which the law seeks to foster confidence.[27]

SET-OFF OF BANK'S CLAIM AGAINST DEPOSITOR'S ACCOUNT AS CONSTITUTING A PREFERENCE UNDER § 60 OF THE BANKRUPTCY ACT.—The question of the exercise of the right of set-off by a bank against a bankrupt's deposit is of unusual importance in its practical application to conditions arising in the present commercial world. The Bankruptcy Act, in preserving the right of set-off, has not made provision for all of the many cases that may arise in the exercise of the right, and much controversy has arisen in the application of the Act to some of the cases not specially provided for. However, the question, as presented above, seems to have been worked out by the courts with more or less definite precision by interpreting each section in the light of the purpose it is to accomplish, and by giving an harmonious construction to the whole act.

§ 68a of the Bankruptcy Act specifically provides for the right of set-off: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The application of this subdivision is settled. § 68b limits the scope of § 68a: "A set-off or counterclaim shall not be allowed in favor of any debtor of the

[23] See 4 WIGMORE, EV., § 2340.
[24] Driver *v.* Driver (Ind.), 52 N. E. 401.
[25] Chapman *v.* Holding, 60 Ala. 522.
[26] See French *v.* Ware, 65 Vt. 338, 26 Atl. 1096; 4 WIGMORE, EV., § 2337.
[27] Holtz *v.* Dick, 42 Ohio St. 23.